89-1202

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NANCY L. FOLSTAD and
GORDON JAMES ARNETT, her attorney,

Petitioners,

v.

ILLINOIS STATE BOARD OF
INVESTMENT, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Seventh Circuit Court of Appeals erred in holding that this appeal was frivolous; and, if not, whether the amount of $9,527 is just damages.

LIST OF PARTIES

The defendants-appellees in whose favor the Appellate Rule 38 sanctions were awarded against the plaintiff-appellant and her attorney are the Illinois State Board of Investment, Donald Wampach, Richard Walton, William Price; Merrill Lynch, Pierce, Fenner & Smith, Inc.; Sheldon Friedstein; Robert Steel; Leslie Golembo; Steven Lamon; and Patrick Smith. No sanctions were awarded to defendant David Reardon, who had been voluntarily dismissed; and the case is approaching trial against the one remaining defendant, Robert J. Harmon. It is therefore the Petitioners' view that neither Robert J. Harmon nor David Reardon have any interest in the outcome of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners herein, Nancy L. Folstad, plaintiff-appellant in the courts below, along with her attorney, Gordon James Arnett, who is also a Petitioner in that Appellate Rule 38 sanctions have been imposed against both of them, pursuant to the Seventh Circuit's Order of August 28, 1989.

OPINIONS BELOW

The opinion of the Seventh Circuit affirming the District Court's dismissal of all but one remaining defendant, Robert J. Harmon, former Director of the Illinois State

Board of Investment, was entered on May 30, 1989; but this is a petition for writ of certiorari seeking review of the August 28, 1989 order of the Court of Appeals awarding Appellate Rule 38 fees and costs to some of the appellees.

The District Court Minute Order of January 4, 1990 is included in the Appendix to show the current status regarding Defendant Harmon for which a pretrial order is to be filed on March 6, 1990.

JURISDICTION

Petitioner brought this action in the United States District Court for the Northern District of Illinois, Eastern Division, invoking federal jurisdiction under 42 U.S.C. §§ 1983 and 1985(2) and (3), 28 U.S.C. §§ 1331, 1343(a)(3), and 2201(a); and 18 U.S.C. § 1964(a) and (c).

On February 4, 1988, the District Court entered a Minute Order dismissing all defendants in Counts I, II and IV and all defendants other than Robert Harmon in Count III for entry of final judgment pursuant to F.R.C.P. 54(b).

Petitioner appealed to the Seventh Circuit, pursuant to 28 U.S.C. § 1292(b). The Court of Appeals affirmed the judgment of the District Court on May 30, 1989. No petition for rehearing was filed.

On November 27, 1989, Justice Stevens ordered that the time for filing this petition for writ of certiorari be extended to and including January 25, 1990 (Appendix G).

The jurisdiction of this Court to review the Order of August 28, 1989 (Appendix A) of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

United States Code: 42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Rule 38 Of The Federal Rules Of Appellate Procedure

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

STATEMENT OF THE CASE

Petitioners herein seek review of the Rule 38 sanctions imposed by the Order of August 28, 1989 (Appendix A in the attached Appendix). The defendants-appellees who had been dismissed, compared to the remaining defendant facing trial, were the subject of allegations of a conspiracy

to defraud the defendant, Illinois State Board of Investment of State Pension Funds including that of the State Judges. In the *Chicago Sun-Times* newspaper of December 1, 1989, attached as Appendix B (from the Motion to Stay the Enforcement of the Judgment of Which Relief Is Sought) there is a news item which divulges newly discovered evidence to the effect that "Illinois is short about $7.5 billion in its five state retirement plans, Auditor General Robert G. Cronson reported Thursday. The shortfall . . . involves the . . . retirement funds for school teachers, university faculty and staff, state employees, judges and legislators. . . ." This new evidence corroborates allegations which were dismissed in the instant lawsuit including the following paragraphs quoted from the Amended Complaint:

> "5. In August 1982 Plaintiff was promoted to sole Portfolio Manager because of her remarkable success in maximizing profits from investment in stocks and bonds worth about six hundred million dollars ($600,000,000) in Illinois pension funds. . . .
>
> 8. The Illinois State Board of Investment is the Trustee of three State pension funds: The General Assembly Retirement System, the Judges' Retirement System of Illinois, and the State Employees' Retirement System of Illinois. . . .
>
> 9. . . . The Commingled Fund must be managed prudently . . . .
>
> 14. Defendants . . . are stock brokers with Defendant MERRILL LYNCH, PIERCE, FENNER & SMITH . . . .
>
> 18. . . . Acting under the sham and pretense of authority . . . but without actual State authority . . . Defendant Harmon conceived, allowed, permitted, condoned and acquiesced in a scheme and conspiracy . . . (a) to embezzle, misappropriate, siphon off, wrongfully encumber and divide, . . . funds, securities, . . . and

other assets rightfully belonging to the beneficiaries of the three pension funds, including Illinois Judges. . . .

24. The misevaluation of the Board's assets, and the resultant diminution or impairment of the three pension funds managed by said Board was accomplished, in part, through manipulations by Merrill Lynch . . . of funds set aside and transferred away from benefits to the pension beneficiaries' funds through misapplication of so-called 'soft dollars' or 'commission dollars'.

25. On or about February 17, 1984, Plaintiff Folstad sent a written memo to Defendant Harmon, the substance of which was that Defendant Harmon should cease and desist from causing further illegal diminution of the pension funds . . . .

27. Such kick-backs from Defendant, Merrill Lynch, to Defendant Harmon who diverted the assets to other than Board funds, were money or other property rightfully belonging to the Board's pension funds. . . .

30. Because of Harmon's false and malicious statements to prospective employers, . . . Plaintiff has been so effectively blacklisted in the investment industry, despite her excellent performance record otherwise, that she . . . (had) been unable to obtain employment. . . .

32. . . . To assure such permanent deprivation, Harmon made it known in the industry that none of the billions of dollars in said Illinois pension funds would be invested with any brokerage firm or broker who hired Plaintiff Folstad.

. . . COUNT II. . . .

18. . . . Then Donald R. Smith became Acting Director prior to Harmon's appointment. Smith was Chairman of the Investment Policy Committee until

> he was murdered on February 4, 1982. Donald Smith was a representative of the State Treasurer and a highly respected man .... He was an expert auditor, and he attended all meetings of the Illinois State Board of Investment in the months preceding his unsolved murder....
>
> 31. In August 1983 Plaintiff met with Marshall Burman ... and advised him of the pressure she was getting from Harmon regarding paying commissions to Merrill's kickback accounts and to others....
>
> 33. When Defendant Harmon's sexual advances had failed to dissuade Plaintiff from complaining about the aforesaid conspiracy to diminish or impair the pension funds ..., Defendant Harmon, on or about December 18, 1981, took Plaintiff to a cocktail party .... He told her that this party was to celebrate the opening of law offices of attorneys linked to the Mafia and he told her they were also closely associated with certain members of Defendant Board. ... He warned her that the persons involved with Organized Crime who were illegally influencing the enterprise comprised of the Illinois State Board of Investment were capable of causing her physical or other harm through such Mafia connections.... He introduced her to politicians, labor bosses and mob members, or so he said. After the party, he said 'If you ever cross me, remember I will get even.'"

Although the attached news story states that "Illinois is short about $7.5 billion in its five state retirement plans ... largely from failure over the years by state budgetmakers to set aside enough money to cover future costs", if the Auditor General had known of the above allegations in the instant lawsuit, he would have had an additional area for investigation. With his unlimited ability for discovery, he might well have uncovered the evidence, which would prove that plaintiff and her attorney herein, to the best of their "knowledge, information, and belief

formed after reasonably inquiry" had here a case "well grounded in fact and . . . warranted by existing law or a good faith argument".

Although the allegations quoted above are from Counts I and II of the Amended Complaint, all counts but III were dismissed and tens of thousands of dollars of Rule 11 sanctions were imposed against plaintiff and her attorney; those sanctions are still pending along with Count III in the District Court, and they are not a part of this Petition for Writ of Certiorari. Rule 38 is short; it simply states, "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

REASONS FOR GRANTING THE WRIT

On this issue, the relevant legal principles are to be found in a copyrighted paper entitled, "*LITIGATING IN BANKRUPTCY; CHICAGO BAR ASSOCIATION; BANKRUPTCIES & REORGANIZATION COMMITTEE; Litigation and Rule 11 (9011)*" dated April 18, 1988 by Larry M. Wolfson of Jenner & Block. Reference is made to Sections C and D thereof, as follows:

> "C. *Selection of Sanction on Appeal*
>
> The selection of an appropriate sanction ordinarily is the responsibility of the district court. Thus, when an appellate court concludes that the district court erroneously denied sanctions, it generally will remand the matter to the district court for it to exercise its discretion in the first instance. *See Cabell v. Petty*, 810 F.2d 463, 467 (4th Cir. 1987); *Norris v. Grosvenor Marketing Ltd.*, 803 F.2d 1281, 1288 (2d Cir. 1986);

Westmoreland v. CBS, Inc., 770 F.2d 1168, 1178 (D.C. Cir. 1985); *see also American Metal Products, Inc. v. Sheet Metal Workers International Association, Local No. 104*, 794 F.2d 1451, 1458 (9th Cir. 1986); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 64 (3d Cir. 1986). At least one court has directed the district court to consider on remand whether sanctions should be imposed *sua sponte*. *See NCNB National Bank of North Carolina v. Tiller*, 814 F.2d 931, 941 (4th Cir. 1987). Nonetheless, on a number of occasions, circuit courts have declined to remand the case and instead have directed that fees be assessed as a sanction under Rule 11. *See, e.g., Dreis & Krump Manufacturing Co. v. International Association of Machinists & Aerospace Workers, District No. 8*, 802 F.2d 247, 256 (7th Cir. 1986); *cf. Barrios v. Pelham Marine, Inc.*, 796 F.2d 128, 133 (5th Cir. 1986) (vacating award for consideration of more severe sanctions).

"D. *Applicability of Rule 11 to Appellate Proceedings*

More than one appellate court has held that Rule 11 applies to all papers filed on appeal and has assessed sanctions for misleading assertions made on appeal. See *In re Kelly*, 808 F.2d 549, 551 (7th Cir. 1986); *In re Curl*, 803 F.2d 1004, 1007 (9th Cir. 1986); *Thornton v. Wahl*, 787 F.2d 1151, 1153 (7th Cir. 1986). More recently, however, the Seventh Circuit has noted that Rule 11 'does not apply directly to (appellate) proceedings.' *Hill v. Norfolk & Western Railway Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987). *See also* Fed. R. Civ. P. 1 (Federal Rules of Civil Procedure govern district court proceedings); *Covington v. Allsbrook*, 636 F.2d 63, 64 n.2 (4th Cir. 1980) (Rule 11 does not apply to notices of appeal)."

According to an ABA article, "*Sanctions—Rule 11 and Other Powers*" (p. 120):

> "Imposing sanctions under Appellate Rule 38—frequently *sua sponte*—has been embraced by the Seventh Circuit as a technique to deter the filing of frivolous appeals. In a series of cases, the court has held that Rule 38 sanctions are appropriate 'where the result is obvious or when the appellant's argument is wholly without merit.' "

Reference is then made to the case of *District No. 8 v. Clearing Div. of United States Indus., Inc.*, 807 F.2d 618, 623 n. 1 (7th Cir. 1986). The article continues on page 129:

> "The Seventh Circuit has made extensive use of Fed. R. App. 38 . . . to impose monetary penalties on parties and counsel filing frivolous appeals. . . .
>
> The Seventh Circuit applies an objective test in determining whether to impose sanctions under Rule 38. *Hill*, 814 F.2d at 1192. Where the offending conduct consists of making objectively groundless legal arguments in appellate briefs, the Seventh Circuit recognizes no due process right to a hearing because 'there are no issues that a hearing could illuminate.' *Id.* at 1201.
>
> In case after case, the Seventh Circuit has awarded damages under Rule 38 in an effort to deter the filing of frivolous appeals and to compensate opposing parties for their reasonable expenses in responding. Under the court of appeals' definition, an appeal is frivolous 'when the result is obvious or when the appellant's argument is wholly without merit.' *Spiegel v. Continental Illinois Nat'l Bank*, 790 F.2d 638, 650 (7th Cir.), *cert. denied* 107 S.Ct. 579 (1986) (quoting *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 184 (7th Cir. 1985); *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690 (7th Cir. 1987)."

Other circuits, however, according to footnotes on page 130, take differing views: "See the discussion of *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*,

107 S.Ct. 1373 (1987) . . . (and) the Sixth Circuit . . . discussion of *Jones v. Continental Corp.*, 789 F.2d 1225 (1986)."

The question, then, is whether, in appellant's arguments to the Seventh Circuit, they were "wholly without merit." In appellant's original brief, it is argued,

I.

PLAINTIFF-APPELLANT'S CLAIMS WERE WELL-GROUNDED IN FACT AND WARRANTED BY EXISTING LAW OR A GOOD FAITH ARGUMENT FOR THE EXTENSION OF EXISTING LAW.

On page 7 of the Memorandum in Support of State Defendants' Motion to Dismiss (Doc. #66), adopted by "Attorney" Michael P. Fontana for his "client" Richard Walton (Doc. #83), it is argued,

> "Plaintiff's RICO claim (Count III) fails even to identify the section of the RICO statute defendants allegedly violated. More important, repeated readings of the complaint as a whole do not inform defendants of the precise nature of the scheme in which they allegedly participated."

In the Amended Complaint, however, plaintiff did attempt to correct this in the RICO count there (II.) by her allegations as to "the section of the RICO statute", pursuant to 18 U.S.C. § 1964(a) and (c) (Par. 1) and "Sections 1961(5), 1962(b) and (d)" (Par. 2). As to "the precise nature of the scheme",

> "18. . . . Donald R. Smith became Acting Director prior to Harmon's appointment. Smith was Chairman of the Investment Policy Committee until he was murdered on February 4, 1982. . . .
>
> 24. . . . The . . . resultant diminution and impairment of the three pension funds managed by said Board was accomplished, in part, through manipula-

> tions of Merrill Lynch, Steven Lamon, Harmon, and Chairman Burman, of funds set aside and transferred away from benefits to the pension beneficiaries' funds through misapplication of so-called 'soft dollars' or 'commission dollars'."

Just because the Magistrate says we have not defined soft dollars should not be a reason to find against plaintiff on the RICO count in the amended complaint.

II.

THE ENTIRE TRIAL COURT PROCEEDING WAS TAINTED BY THE APPEARANCE AND FILING AND COURT ARGUMENTS ON BEHALF OF DEFENDANTS, RICHARD WALTON AND WILLIAM L. PRICE, BY A PARTNER OF THE SONNENSCHEIN LAW FIRM, MICHAEL P. FONTANA, WHO HAD NEVER GRADUATED FROM LAW SCHOOL BUT WAS PRACTICING FOR TEN YEARS IN THE U.S. DISTRICT COURT, THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND STATE COURT.

Plaintiff's counsel presented a Motion for an Investigation regarding the consequences of these many motions, affidavits and other papers filed in the instant case by Michael P. Fontana; and at the request of the attorney for plaintiff, the Motion was transferred to the Executive Committee for conducting such an investigation.

As stated in one of the Reports and Recommendations of Magistrate Bucklo, the one dated August 13, 1987, it is stated (Doc. #183):

> "The present action was brought by Nancy Folstad. According to her amended complaint, between August 1977 and March, 1985, she was employed by the Illinois State Board of Investment ('Board') to provide investment advice to the Board, which manages state pension funds. While so employed, Folstad says

she detected a conspiracy organized by Robert Harmon, Director of the Board, to misappropriate Board funds and to deceive outside regulators as to the existence of such misappropriation. Folstad alleges that she informed Harmon, his minions, and his co-conspirators that she was onto them. She says that in retaliation, or to protect himself, Harmon organized a secondary conspiracy to prevent Folstad from obtaining work in the investment community. Harmon allegedly did this by denying brokers or investment firms business with the Board unless they agreed to hire Folstad. William Price, a portfolio manager for Rosenberg Capital Management, is alleged to have agreed to assist Harmon in his scheme in order to obtain business with the California Pension Board, over which Harmon had influence through the presence on the California Board of a former member of the Illinois board. Folstad says Price agreed to tell Folstad that he was considering her for a position with his firm and to dissuade her from applying elsewhere, in order that she would deplete her resources and be unable to bring legal action against Harmon, the Board, and others."

The Magistrate appears to blithely ignore the Affidavit of plaintiff, including that she could stay at Price's guest room in California; the Magistrate merely states, on page 3,

"Price's contacts with Folstad and Illinois were limited. They consisted of a meeting with Folstad in December, 1985 in a hotel in Chicago near O'Hare, at which the status of Folstad's application for employment with Rosenberg Capital Management was discussed; several telephone conversations between Price in California and Folstad in Illinois concerning Folstad's employment application; one telephone call made by Price to Folstad from Illinois, two trips by Folstad to California, paid for by Rosenberg Capital Management, to discuss employment; and a number

> of business trips by Price to Illinois on business unrelated to the furtherance of the conspiracy.
>
> "None of these contacts are sufficient to establish personal jurisdiction under the Illinois long arm statute. . . . However, Price was in Illinois at those times to conduct other business unrelated to the conspiracy against Folstad."

On the one hand, the Magistrate alludes to the supposed fact that "Price was in Illinois at those times to conduct business unrelated to the conspiracy against Folstad," which is an acceptance of plaintiff's allegations which accepts that Price was part of a conspiracy against Folstad. On the other hand, the Magistrate completely fails to rule upon plaintiff's contention that, assuming she can prove at trial a RICO-type conspiracy involving Price, this would establish personal jurisdiction over him, it being a national conspiracy, regardless of any lack of provision for jurisdiction under the Illinois long-arm statute. For example, in the Magistrate's Recommendation of August 13, 1987 (Doc. #185), she states on the first page,

> "In her original complaint, Folstad attempted to allege a political firing in violation of 42 U.S.C. Sec. 1983, as well as violations of RICO and sex discrimination in violation of Title VII and Sec. 1983. Judge Plunkett dismissed the complaint without prejudice to her filing an amended complaint that stated a claim for relief. Folstad's amended complaint raises new theories under which she claims the defendants are liable to her under Sec. 1983 and RICO. I recommend that, with one exception, the claims be dismissed."

It is not entirely clear whether all but one claim was dismissed because "Folstad's amended complaint raises new theories". In dismissing the original Complaint Judge Plunkett had allowed plaintiff to see if she could file an

Amended Complaint that stated good causes of action; raising new theories was perfectly permissible under such an Order. If Magistrate Bucklo dismissed the claims for some other reason, plaintiff respectfully suggests that a Second Amended Complaint should have been allowed.

Evidence that defendant Walton's "attorney", Michael P. Fontana, had been working closely with attorneys for the State Defendants, which included three attorneys from Jenner & Block as well as four Assistant Attorneys General, is the fact that the Appearance of the Assistant Attorneys General were filed on September 16, 1986 (Doc. #51); the State Defendants Motion to Dismiss (Doc. #53) was filed on September 17th; the Motion to Dismiss Defendants Friedstein and Steele (Doc. #52) was also filed on September 17 as was the Motion of Lamon, and Golembo (Doc. #55). Although the Docket Sheets show that Walton's motion to dismiss for failure to state a claim (Doc. #63) was "filed 09/24/86", the actual Certificate of Service for Docket No. 63 reads, "A copy to be hand-delivered, by messenger, on this 17th day of September, 1986" and the Notice of Motion (Doc. #63) reads on the second page, "Dated: September 17, 1986." While plaintiff's attorney realizes that, even though all those defendants' lawyers coordinated their efforts in preparing a Motion to Dismiss for Failure to State a Claim, it does not prove that their clients had exerted a similar amount of joint cooperation black-listing plaintiff throughout the entire investment industry. Plaintiff is convinced that it is a reasonable inference. Regardless of what this Court may infer in that regard, plaintiff does contend that since Fontana thought it was necessary to adopt the Motions to Dismiss for Failure to State a Claim, which were prepared and filed simultaneously by various law firms for their respective clients, this again supports plaintiff's conten-

tion that, if the Lack of Personal Jurisdiction was so clear-cut that it should justify Rule 11 sanctions, as the Magistrate held, it would have been unnecessary and unjustified to have filed any other kind of motion, *i.e.* for Failure to State a Claim.

On June 5, 1987, "Attorney" Michael P. Fontana filed another Appearance, this time as Counsel for defendant, William L. Price (Doc. #158), and also filed his Rule 39 Affidavit. "Attorney" Michael Fontana failed to assert the type of representation necessary to prevent the entry of a Default Judgment for $325,000 against one of his "clients", William L. Price. The *Morgan* case goes into considerable detail about how the Seventh Circuit decisions differ from other circuits, e.g., the Eleventh Circuit, and also mentions, for example, the Fifth and Eighth Circuits' interpretations. For example this Court of Appeals stated at page 7 of the *Morgan* case, "This same aspect of the pattern requirement has divided District Courts in our own Circuit."

In appellant's view, her Amended Complaint was well-grounded in fact and warranted by a good faith argument for the existing law, according to the reasoning in the case of *Butcher's Union v. SDC Investment, Inc.*, 788 F.2d 535 (9th Cir. 1986). The Memorandum states:

> "In *Butcher's Union*, the plaintiffs alleged that four separate employers had conducted a nationwide RICO conspiracy, as well as four individual RICO conspiracies, in concert with certain labor lawyers, who were also named as defendants. Notwithstanding that the same lawyer defendants has been involved in all four labor disputes, the Ninth Circuit rejected the claim that Section 1965(b) empowered the district court for the Eastern District of California (where certain defendants resided) to exercise jurisdiction over all the

> alleged co-conspirators. Based on an analysis of RICO's legislative history, the Court held there was no jurisdiction over the out-of-state defendants because the plaintiff had failed to allege a single nationwide pattern of racketeering activity involving all of them. 788 F.2d at 538-39. The Court reasoned that the common participation of the defendant lawyers and certain others in each of the alleged individual conspiracies was insufficient to overcome the employers' lack of specific knowledge about the other local conspiracies. . . . Congress enacted the 'broad venue provision and process powers' of Section 1965(b) because it 'believe(d) that these broad provisions (were) required by the nationwide nature of the activities of organized crime in its infiltration efforts.' S. Rep. No. 617, 91st Cong., 1st Sess. 160-61 (1969). Plaintiff has alleged no facts showing a nationwide pattern of racketeering activity involving Walton, or nationwide 'infiltration efforts,' nor has she alleged that all of the defendants are connected with a single nationwide RICO enterprise. Extension of jurisdiction over Richard Walton does not serve the intended purpose of Section 1965(b)."

Plaintiff certainly believed that she had "alleged that all of the defendants are connected with a single nation-wide RICO enterprise."

Petitioners incorporate herein by reference the Objections of Plaintiff and Her Attorney to Petitions of various Appellees under Rule 38, which is in the attached Appendix as Appendix D.

Attached to the Amended Application for Extension of Time, which has been granted, was Appendix E, also attached hereto in the Appendix. It is a copy of an item in the *Chicago Daily Law Bulletin* for June 8, 1989; and it begins,

> "The 7th U.S. Circuit Court of Appeals is alone in its adoption of an erroneous standard for sanctions against lawyers and is scaring lawyers and litigants out of filing good-faith appeals, the Chicago Council of Lawyers said in a brief filed with the U.S. Supreme Court."

This is exactly the view of the appellant and her attorney, the petitioners in the instant case; and they therefore believe that this Petition for Writ of Certiorari should be granted and consolidated with the petition covered by the amicus curiae brief filed by "L. Stevens Platt, a Chicago lawyer fined $1,000 and opposing counsel's cost of the appeal for filing a 'frivolous' appeal." The news article also states, and petitioners herein agree:

> " 'While the decision below threatens lawyers in all types of appeals, it is particularly threatening to lawyers who bring meritorious appeals under the civil rights laws, and it is in this kind of case that the 7th Circuit has been particularly zealous in handing out sanctions' ".

The instant case is brought under the Civil Rights Act and it remains pending in the District Court as to a principal defendant—Robert J. Harmon, former Director of Defendant Illinois State Board of Investment. As recently as this month, Judge Plunkett ruled on the cross-motions for summary judgment, denying them for both the plaintiff and the defendant and holding in the Minute Order of January 4th (Appendix F):

> "Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is denied. Disputed questions of fact exist concerning whether Folstad was terminated on the basis of her sex and whether, while employed, she received lower pay because of her sex. Final pretrial order to be filed on March 6, 1990. . . ."

CONCLUSION

Since, as indicated by Appendix E, the "7th U.S. Circuit is alone in its adoption of an erroneous standard for sanctions against lawyers and is scaring lawyers and litigants out of filing good-faith appeals," its decisions are in conflict with the other courts of appeals, e.g. the Second, Fourth and Ninth Circuits as quoted *supra*, which is contrary to the provisions of Rule 17.1(a) and therefore calls for an exercise of this Court's power of supervision.

It stands to reason that this cannot be a frivolous case without merit when disputed questions of fact exist and a pretrial order is yet to be filed and a trial held.

It is therefore respectfully requested that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

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Attorney for Petitioners

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 28, 1989.

Before

Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. WILBUR F. PELL, JR., *Senior Circuit Judge*

NANCY L. FOLSTAD,

Plaintiff-Appellant,

No. 88-1384 vs.

ILLINOIS STATE BOARD OF INVESTMENT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 4667—Judge Paul E. Plunkett

This matter comes before the court for its consideration of the following documents:

1. "STATE DEFENDANTS' STATEMENT OF ATTORNEYS' FEES AND COSTS" filed herein on June 8, 1989, by counsel for the defendants-appellees.

2. "DECLARATION OF ATTORNEY'S FEES OF APPELLEES RICHARD WALTON AND WILLIAM L. PRICE" filed herein on June 9, 1989, by counsel for the appellees.

3. "PETITION OF APPELLEE MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. FOR FEES AND EXPENSES PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 38" filed herein on June 9, 1989, by counsel for the appellees.

4. "DECLARATION OF ATTORNEY'S FEES OF APPELLEES ROBERT STEEL AND SHELDON FRIEDSTEIN" filed herein on June 9, 1989, by counsel for the appellees.

5. "BILL OF COSTS" filed herein on June 9, 1989, by counsel for Appellees Robert Steel and Sheldon Friedstein.

6. "BILL OF COSTS" filed herein on June 12, 1989, by counsel for Appellees Richard Walton and William L. Price.

7. "PETITION OF APPELLEES STEVEN LAMON, PATRICK SMITH AND LESLIE GOLEMBO FOR FEES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 38" filed herein on June 9, 1989, by counsel for the appellees.

8. "OBJECTIONS OF PLAINTIFF AND HER ATTORNEY TO PETITIONS OF VARIOUS APPELLEES UNDER APPELLATE RULE 38" filed herein on June 26, 1989, by counsel for the plaintiff-appellant.

On consideration thereof,

IT IS ORDERED that fees and costs are AWARDED as follows:

1. To appellees Harmon, Wampach, and the Illinois State Board of Investment - attorneys fees of $2,722.00 and costs of $152.00.

2. To appellees Walton and Price - attorneys fees of $2,255.00 and costs of $250.00.
3. To appellee Merrill, Lynch, Pierce, Fenner & Smith, Inc. - attorneys fees of $2,250.00 and costs of $66.00.
4. To appellees Friedstein and Steel - attorneys fees of $1,078.00 and costs of $75.00.
5. To appellees Golembo, Lamon and Smith - attorneys fees of $679.00.

APPENDIX B

34 CHICAGO SUN-TIMES,
FRIDAY, DECEMBER 1, 1989

State retirement funds billions short

By Charles N. Wheeler III

Springfield Bureau / Chicago Sun-Times

SPRINGFIELD—Illinois is short about $7.5 billion in its five state retirement plans, Auditor General Robert G. Cronson reported Thursday.

The shortfall, which creates no immediate problem, involves the retirement funds for school teachers, university faculty and staff, state employees, judges and legislators.

It stems largely from failure over the years by state budgetmakers to set aside enough money to cover future costs, according to an analysis of the retirement systems.

Despite the unfunded liabilities, current and future pensioners need not worry about getting their retirement checks, because pension benefits are guaranteed by the state Constitution, said Judith R. Brown, audit manager for the study.

However, the shortfall could pose a difficult problem for 21st century lawmakers, who could be forced to slight education and human services to pay mounting pension bills handed down from previous generations, she said.

"The longer you delay putting away what is needed today, the higher the cost gets in the future," Brown said.

In recent years, state contributions to the systems have not matched the amounts going out in monthly pension checks, and investment income and payments by current employees have made up the difference.

Once the baby boom generation begins to retire, auditors warned, "The state will then be forced to allocate a significant portion of the general funds budget to meet these pension obligations."

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

NANCY L. FOLSTAD,

Plaintiff-Appellant,

No. 88-1384 vs.

ILLINOIS STATE BOARD OF INVESTMENT, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 86 C 4667—Judge Paul E. Plunkett

MOTION TO DISQUALIFY JUDGE POSNER FROM PARTICIPATING IN THIS APPEAL

Now comes the Plaintiff-Appellant, NANCY L. FOLSTAD, and her attorney, GORDON JAMES ARNETT, stating as follows:

1. On July 11th there was filed in this court the "Appellant's Response to Supplement to Motion of Richard Walton and William L. Price to Dismiss Appeal". Plaintiff-Appellant's attorney incorporates herein by reference the said Appellant's Response attached hereto as Exhibit A. As indicated in its heading, it refers to Appellees Walton's and Price's Motion to Dismiss this Appeal; and their argument is based upon their statement quoted on page 2 of

the Response: "This Court previously had found that appellant's counsel, Gordon James Arnett, had filed briefs which fall below 'minimum professional standards,' . . ."

2. On July 28, the same attorneys for those two appellees (the Sonnenschein lawfirm also represents two other appellees) filed a "Reply Memorandum in Support of Motion of Richard Walton and William L. Price to Dismiss Appeal (Exhibit B)". In it they further maliciously deprecate appellant's attorney and thereby attempt to bias this court against him and his current client, by stating, "We are shocked at the personal attacks on a member of this Court leveled by appellant's counsel, Gordon James Arnett."

3. On August 3rd, this Court entered an Order mailed to appellant's attorney of the 10th (Exhibit C), which states that said appellees' attorney had not filed "a motion for leave to file a reply memorandum." This Court "ORDERED that the 'REPLY MEMORANDUM IN SUPPORT OF MOTION OF RICHARD WALTON AND WILLIAM L. PRICE TO DISMISS APPEAL' is stricken." Said stricken unauthorized Reply is just one example of the unprofessional filing by the Sonnenschein lawyers in this appeal and in the trial court, yet they have nonetheless been awarded some $13,000 in sanctions against appellant's attorney (but not his client).

4. If appellant's attorney's aforesaid Response to Supplement to Motion (Ex. A) were such a personal attack "on a member of this Court" as to be shocking, at the very least this Court would have stricken the Response. Instead this Court struck (Ex. C) the appellees' Reply to that Response, implying that what this Court found to be "shocking" was the appellees' Reply.

5. The basis of appellant's attorney's Response to the aforesaid appellees' Supplement to Motion to Dismiss Appeal was that the Suter appeal upon which their motion to dismiss was predicated had been decided in this court contrary to the facts and contrary to the Supreme Court *Lowe* decision. Said Richard W. Suter appeal, where Mr. Suter had been represented by Attorney Arnett, as Nancy Folstad is in the instant appeal, was really two cases consolidated. In one, a plaintiff, R. D. McCullough, had sued Defendant Suter under RICO. Judge Parsons had awarded treble damages under the civil provisions of the Racketeer *Influenced* Corrupt Organizations act (emphasis added). In the appeal this attorney argued (and still contends) that Congress, in using the term "Racketeer Influenced" could never have intended that any person, even if he were a racketeer, could corruptly *influence his own* sole proprietorship. Nevertheless, this court held that such an extension of the RICO law was proper and affirmed the lower court. This attorney (Gordon James Arnett), knowing of the prior Suter ruling, was justified in reasoning that, if this Seventh Circuit could have extended the RICO Act *that far*, it could also extend it less far to cover the facts and circumstances of the instant case. Thus, plaintiff-appellant's counsel was justified under Rule 11, F.R.Civ.P., in believing that the R.I.C.O. cause of action was "warranted by . . . a good faith argument for the extension . . . of existing law . . . ." Any Court of Appeals, like Judge Posner in this court, which could have held that a sole proprietor (Richard W. Suter), could be guilty of corruptly influencing his own company, as referred to in Appellant's Response to Supplement (Ex. A above) can reasonably be expected to also extend RICO to cover the facts in the instant case regarding the alleged corrupt influence over the Illinois Judges' Pension Fund,

including the conspiracy of brokers and brokerage houses, defendants herein, to blacklist plaintiff from employment through the entire investment industry for her refusal to violate her fiduciary duties as sole portfolio manager of about one billion dollars in three state pension funds.

6. Judge Posner can be expected to be biased against this attorney and his client because of his prior personal statements against this attorney in the published Suter appeal, and he can be expected to be further biased because of the personal rebuttal against his ruling in that case, in the above-mentioned Response to Supplement.

WHEREFORE, Plaintiff-Appellant prays for an Order granting this motion to disqualify Judge Posner from participating in the instant appeal.

_____

Appellant's attorney

GORDON JAMES ARNETT
Attorney for Plaintiff-Appellant

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APPENDIX D

No. 88-1384

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NANCY L. FOLSTAD,

Plaintiff-Appellant,

vs.

ILLINOIS STATE BOARD OF INVESTMENT, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division,
No. 86 C 4667—The Honorable Paul E. Plunkett, Judge Presiding

OBJECTIONS OF PLAINTIFF AND HER ATTORNEY TO PETITIONS OF VARIOUS APPELLEES UNDER APPELLATE RULE 38

The Plaintiff-Appellant, Nancy L. Folstad, and her attorney, Gordon James Arnett, herewith respond to the Bill of Costs filed on Behalf of Appellees Robert Steel and Sheldon Friedstein; the Petition of Merrill Lynch, Pierce, Fenner & Smith, Inc. for Fees and Expenses; the Bill of Costs of Richard Walton and William L. Price; and the State Defendants' Statement of Attorneys' Fees and Costs. Appellate Rule 38 does not provide for Attorneys' Fees as distinguished from Costs. The Rule merely states:

> "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee."

Rule 39 relates to costs also; it includes—

> "(I)f an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed . . . ."

This makes a distinction between Rule 38 for costs where the court has determined "that an appeal is frivolous" as contrasted with Rule 39 where "an appeal is dismissed". In the instant appeal, this court found that—

> "Nancy L. Folstad sued the Illinois State Board of Investment (Board), its director, Robert J. Harmon, Merrill Lynch, . . . and various Investment brokers under . . . (RICO) for their alleged involvement in an investment kickback scheme and conspiracy to deny Folstad employment in the investment industry. . . . and that she was sexually harassed and discriminated against in violation of 42 U.S.C. §§ 1983 and 1985."

Whether the defendants (other than Harmon) should have been dismissed "under Fed. R. Civ. P. 12(b)(6) for her alleged failure to state a claim" could not have been properly determined, because she had been denied discovery to seek proof of defendants' "involvement in an investment kickback scheme and conspiracy to deny Folstad employment" throughout the entire "investment industry." Without that, how could a court determine whether this was a frivolous appeal?

In appellant's view, Rule 38 sanctions should be imposed, instead, upon the appellees' lawfirm whose partner of 10 years was NEVER A LAWYER. Sanctions should also be imposed against the appellees and their attorneys who wrongly contended that the pending Rule 11 sanctions in the trial court were an issue in this appeal.

THE STATE BOARD OF INVESTMENT COULD BE AN ENTERPRISE IN A RICO CLAIM

Regarding this Court's decision that there was no basis for a RICO claim, the following quotation from the *RICO Reporter* (1986 RICO Law Reporter, Inc., p. 347) seems relevant here:

> "Matters are more complicated in the Sixth Circuit in the wake of the en banc decision in *United States v. Thompson*, 685 F.2d 993 (6th Cir. 1982). *Thompson* held that as a matter of statutory construction, a state government agency can constitute an enterprise."

The attorney preparing this memorandum feels justified in his opinion that it is impossible to tell to what extent the various courts of appeal will extend RICO beyond its apparent original Congressional intent; because his own experience in this court in a Richard Suter v. SEC appeal was that the Court can even extend RICO to apply to a sole proprietor who allegedly Corruptly Influenced his own publishing business—the Court thereby rendering meaningless the "I" (Influenced) in the initials, R. I. C. O.

THERE *IS* AUTHORITY THAT PLAINTIFF HAS A CONSTITUTIONALLY PROTECTED RIGHT TO FOLLOW HER CHOSEN PROFESSION OF SOLE EQUITY PORTFOLIO MANAGER.

As stated in footnote #1, "Folstad's brief includes the argument heading 'Plaintiff was Denied her Constitutional Right to Property in the Form of Employment in her Profession Throughout the Entire Investment Industry.' . . . There is no authority refuting the lower court's conclusion that Folstad had no property interest in her profession, and we know of none."

A case which supports Plaintiff-Appellant's position that being blacklisted throughout the entire national investment industry is a deprivation of a constitutionally protected property right is *Roth v. Board of Regents*, 310 F.Supp. 872. In that case, the late Judge James E. Doyle in Madison reasoned:

> "(1) Neither defendant is a municipal corporation . . . defendants are 'persons' under 42 U.S.C. 1983. (2) . . . (I)t is alleged that, acting under color of state law, they have deprived plaintiff of rights secured to him by the Constitution of the United States. . . .
>
> The most recent guidance from the Supreme Court appears to be *Cafeteria Workers v. McElroy*, 367 U.S. 886 . . . .
>
> The Court stated that it was required first to determine 'the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' . . . The private interest affected 'most assuredly was not the right to follow a chosen trade or profession.' "

It may be necessary to reread the last sentence; what it means is that, if the *Cafeteria Workers* case *had* involved "the right to follow a . . . chosen profession", (which it had *not*), as is true in the instant case, it *would be* a protected right.

One of the cases with which Plaintiff's counsel felt this Court would be aware in support of the claim of a constitutional property right is the Seventh Circuit 1983 case of *Vail v. Board of Education of Paris Union School No. 95, et al.*, 706 F.2d 1435. It concludes:

> "In this § 1983 action this court must once again address the meaning of 'property' as used in the Due Process Clause." (p. 1436)

The Court reasoned on page 1437:

> "On these findings of fact the district court held that Vail had a constitutionally protected property interest in his continued employment with the Board. Citing *Perry* . . . the court held that the Board acting under color of state law had deprived Vail of property without due process of law . . . .
>
> The nature of property interests to be protected by the Due Process Clause of the Constitution has been addressed in many contexts by the Supreme Court. . . . In . . . *Perry* . . . the Court found a property interest in continued employment that had been fostered by the rules and the policy of the university, despite the lack of tenure or a contractual provision (p. 1437)."

In the instant case, where the fact is that Plaintiff has been blacklisted throughout the entire Investment Industry, it is even more clearly a case of deprivation of a constitutionally protected property right. She is one of a relatively small list of sole portfolio managers with experience and ability in profitably managing a portfolio of about one *b*illion dollars in institutional pension funds, including the State Judges' Pension Fund.

This Court quotes three citations which stand for three distinct bases for finding an appeal to be frivolous (p. 3):

> "An appeal is frivolous when appellant's arguments are wholly without merit, . . . when counsel fails to address relevant arguments and cases cited by the district court, . . . or when appeal is pressed out of sheer obstinacy."

Rather than pointing out which one of those deficiencies the Court believes is applicable here, the Opinion merely continues, "We find this case ripe for Rule 38 sanctions, although we find double costs excessive. It is not

our intent to bankrupt the client or her attorney, but rather to deter frivolous appellate litigation."

Appellant's counsel assumes that they are facing sanctions for the second reason—"fails to address relevant arguments and cases cited by the district court" on the subject of "her Constitutional Right to Property in the Form of Employment in her Profession Throughout the Entire Investment Industry." This Court implies that, since "we know of none", there is no case supporting appellant's contention that she has such a right. Conversely, appellant's attorney has inferred that this Court would be cognizant of any "authority refuting the lower court's conclusion" when there exists such authority.

ALTHOUGH THE ISSUE OF RULE 11 TRIAL-COURT SANCTIONS IS NOT YET BEFORE THIS COURT, ADDING RULE 38 TO RULE 11 SANCTIONS MIGHT WELL BANKRUPT APPELLANT'S ATTORNEY AND ADVERSELY AFFECT HIS HYPERTENSION.

On the subject, "It is not our intent to bankrupt the client or her attorney", this approach puts "her attorney" in an untenable position in trying to respond to that point. If this attorney is to argue that, for reasons such as trying to protect a client's legal interests by appealing a case without charging the usual large fee, sanctions would tend to bankrupt him, he can infer that some judge on this panel would reason—see, his being subject to going bankrupt merely confirms that he is not wealthy like attorneys who charge large appellate fees because they are such honest and competent attorneys.

On August 9, 1988 an Order was entered that "Attorney Gordon Arnett is ordered to pay the state defendants' law firm, Jenner & Block, the sum of $12,114.25 in attorneys'

fees and $845.93 in costs. Although the issue of Rule 11 sanctions has not yet been raised by plaintiff and her attorney in the Court of Appeals, if this attorney should be required to pay the foregoing sum along with some Rule 38 costs, it would indeed bankrupt him. Plaintiff's attorney incorporates herein his July 5, 1988 Declaration, which had been attached to "Plaintiff's Response to Rule 11 Sanctions for Defendant Wampach" filed on July 5, 1988 (see Exhibit A).

This Court ought not to consider this appeal frivolous at least as to Defendant Price; because Judge Plunkett would not have entered a large Default Judgment against Price if the Judge had believed this to be a frivolous claim. On August 13, 1987, Magistrate Bucklo entered a Report and Recommendation which included:

> "William Price, a portfolio manager for Rosenberg Capital Management, is alleged to have agreed to assist Harmon in his scheme in order to obtain business with the California Pension Board, over which Harmon had influence through the presence on the California Board of a former member of the Illinois Board.
>
> Price seeks to set aside the default judgment on the ground that the judgment is void because the court lacked personal jurisdiction over him."

The Magistrate then did set aside the default judgment of about $300,000—not because it was a frivolous claim but because of lack of personal jurisdiction.

It is apparent that "Folstad and Arnett may in good faith contest the amount of these requests where appropriate (p. 3)." The amount of these requests is as follows:

The Unpublished Order in this appeal is dated May 30th. It provides that the appellees are "given ten days

to file copies of their reasonable expenses. Folstad and Arnett are then given 15 days to respond." That gives until June 24th to respond—a Saturday. The petition from Merrill Lynch's attorney, due on June 9th, is postmarked June 12th.

Considering first the "State Defendants' Statement of Attorneys' Fees and Costs", it has always been ambiguous as to just who, other than the Board and Harmon, were being referred to as "State Defendants" in that they included Defendant Donald Wampach, a former Board employee, prior to Folstad's termination. If he is indeed a State Defendant, he should have been represented solely by the Illinois Attorney General's Office like the other two; but he has been represented by separate Jenner & Block attorneys including Sidney I. Schenkier who is mentioned on page 1 of the Statement. Jenner & Block has obtained large Rule 11 sanctions in the trial court, but Assistant Attorney General Flahaven has sought no sanctions for the other 2. In this context, this Court is referred to the sentence in the center of page 1 of the State Defendants' Statement reading, "In support of this Statement, the State Defendants submit Affidavit of Sidney I. Schenkier, setting forth in detail the background of the attorney for whose time reimbursement is being sought . . . ." His time (32.25 hours for $5,445.00) should be completely disallowed for each of three reasons. One, attorneys' fees are not costs under Rule 38; and secondly, there was no justification for any attorney outside of the Attorney General's Office to represent the State Defendants. Lastly, he and his lawfirm have already been awarded such large Rule 11 sanctions that anything further would be both unconstitutional and would be a huge burden threatening appellant's attorney with bankruptcy.

In the "Bill of Costs" filed on behalf of Richard Walton and William L. Price, it is stated on page 1, "The taxable costs of producing this brief and supplemental appendix are documented in the Affidavit of Christopher Q. King". At the end of the 3-page Bill of Costs, it is respectfully submitted by Harold C. Hirschman and Christopher Q. King, "Attorneys for Defendants-Appellees"; and following that is shown "OF COUNSEL: Sonnenschein Carlin Nath & Rosenthal. . . ." There were Appearances filed in both this court and the trial court, signed first by Michael P. Fontana and then by Christopher Q. King; but the latter signature was also written by Fontana, followed by his initial. As exposed in this case in the trial court, Michael Fontana was never an attorney, although he was a partner of the Sonnenschein Carlin firm, where he had been for ten years. It is hardly equitable for Rule 38 sanctions to be imposed upon plaintiff's attorney in favor of the lawfirm whose clients, Walton and Price, had as their trial and appellate attorney, a man who never took a bar exam, and who is still the subject of a current investigation by A.R.D.C. While the amount of $1,185.52 may not appear to be unreasonable compared to the $5,445 in *attorney's* fees sought by Jenner and Block, claiming to represent one of the three State Defendants, it is unreasonable to allow sanctions under the aforesaid circumstances of allowing a layman to act as a law partner and represent Walton & Price. See Exhibit B.

A recent federal case in this Circuit (decided 12/31/87), *In the Matter of Central Ice Cream Company, Debtor*, 836 F.2d 1068, holds as follows:

> [7] An excessive request for fees is a sanctionable event, and district courts should try to impose sanctions for each independently sanctionable event. If

> these turn out to offset, so it goes, if the difficulty of ascertaining sanctions makes a rough equation of the two desirable, the judge may cancel them; but before holding the dual acts of misconduct a wash, the court should consider whether the two objectionable acts deserve roughly equal sanctions. Just as in modern practice the misconduct of a party does not terminate its right to equitable relief, see *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 193-95 (7th Cir.1985); *Shandel v. McDermott*, 775 F.2d 859, 868 (7th Cir.1985), so the misconduct of a party does not terminate its right to attorneys' fees established as a result of its opponent's independent wrong.

As to the Bill of Costs for Appellees Robert Steel and Sheldon Friedstein, seeking $442.96, appellant's counsel can find no fault with that amount; but the general practice of imposing sanctions under Appellate Rule 38, similar to Rule 11 sanctions in the district courts, is best summarized by District Judge Paul A. Simmons in the Western District of Pennsylvania, Civil Action No. 87-0629, dated January 20, 1988, the relevant portion of which transcript of proceedings is attached hereto. Plaintiff and her counsel agree wholeheartedly with Judge Simmons' views including,

> "It's certainly not designed to help people who had original ways of vindicating their rights (p. 26).
>
> . . .
>
> I say to myself, if I had to back up every reason for a cause of action before I won it with Rule 11, there were many, many causes of action that I instituted that wouldn't have gotten very far. Many, many people thought they couldn't be won, but they were. . . . They don't want these imaginative legal actions. They want to keep people out of the courts.

> That's all that is, a device to chill the person's expression in a peaceful way in a court setting. That is one of the functions of the court, in my opinion (p. 33). . . . So, I'm just telling you like it is. This whole idea of Rule 11 is undermining the very system that it purports to uphold. I say it in a tone or in a reference of a person who is sad about it. Rule 11 is a sad, sad commentary on our government."

And Appellant's attorney in the instant case is sad about the imposition of Rule 38 sanctions, for the same reasons.

The "Petition of Appellee Merrill Lynch, Pierce, Fenner & Smith, Inc. for Fees and Expenses pursuant to Federal Rule of Civil Procedure 38" also should be denied because it is not seeking Costs—it seeks $6,144.25 in ATTORNEYS' FEES. Another reason why Merrill Lynch doesn't deserve an award of sanctions is that Merrill Lynch and its attorneys continue to conceal records of soft-dollar transactions between it and the Board, a dispute over the balance of which was one of the reasons why plaintiff was terminated and blacklisted throughout the entire investment industry. Trial Judge Plunket as recently as during the past month has allowed depositions of present and former employees of Merrill Lynch, whose answers are evasive, misleading and inaccurate.

If Plaintiff-Appellant and her attorney should lose the trial of Count III, at that time the issue of Rule 11 sanctions would be at issue here. It is therefore suggested that, if this Court is going to impose any Rule 38 sanctions, it postpone doing so until the appeal of Count III against Robert J. Harmon. Otherwise, this attorney may not have enough incentive to keep representing Nancy Folstad.

It is therefore respectfully suggested that no Rule 38 sanctions be imposed, at least not in this appeal.

/s/ Gordon James Arnett
Appellant's attorney

GORDON JAMES ARNETT
Attorney for Plaintiff-Appellant

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APPENDIX E

Chicago Daily Law Bulletin 6/8/89

7th Circuit sanctions hit in top court brief

By KATHERINE SCHWEIT

Law Bulletin staff writer

The 7th U.S. Circuit Court of Appeals is alone in its adoption of an erroneous standard for sanctions against lawyers and is scaring lawyers and litigants out of filing good-faith appeals, the Chicago Council of Lawyers said in a brief filed with the U.S. Supreme Court.

The amicus curiae brief supports L. Steven Platt, a Chicago lawyer fined $1,000 and opposing counsel's cost of the appeal for filing a "frivolous" appeal.

Platt of Arnold & Kadjan has asked the U.S. Supreme Court to consider his appeal.

"By terming 'frivolous' an appeal that 'restates arguments properly rejected by the district court,' the 7th Circuit threatens litigants and lawyers with sanctions for taking good-faith appeals that deserve to be taken," said the Council brief, written by George F. Galland Jr. and Thomas R. Meites.

Platt represented Ronald Mays in his civil rights suit against the Chicago Sun-Times and his union. Mays contended he was passed over for promotion because he is black.

The district court disagreed, however, and granted the Sun-Times and union's motion for summary judgment. On appeal, the 7th Circuit upheld the district court finding and also granted the defendant's motion for sanctions for frivolous pleadings.

"In this case, the district court's opinion cogently explained why plaintiff's affidavits were not sufficient to defeat a motion for summary judgment," Judge Joel M. Flaum wrote in the 7th Circuit's amended opinion released Feb. 24.

"Given the incisive nature of the district court's opinion, appellant's attorney could not have had a reasonable expectation that the same arguments would prevail in this court and merely delayed the inevitable by filing this appeal."

That view, the Council brief argued, is an "alarming definition" of frivolous appeal.

"While the decision below threatens lawyers in all types of appeals, it is particularly threatening to lawyers who bring meritorious appeals under the civil rights laws, and it is in this kind of case that the 7th Circuit has been particularly zealous in handing out sanctions," the brief said.

The brief argues three points, focusing first on what it calls the "erroneous standard of frivolous appeals that will chill meritorious appeals."

Second, it contends the appeals court misconstrued Federal Rule of Appellate Procedure Rule 46 by delegating to litigants the crucial decision to initiate disciplinary proceedings.

Third, the Council contends the 7th Circuit erred in grafting Rule 11 onto the appellate disciplinary process.

In its first argument, the brief noted that most unsuccessful appeals restate arguments that the district court rejected.

"Every day, dozens of appellate decisions decide that although the appellant has some good arguments, the district court was nonetheless right to reject them," the Council said. "And there is nothing wrong with merely restating such arguments on appeal. Appellants are sup-

posed to restate them. They are not supposed to state arguments on appeal that were not considered by the district court."

In its second argument, the Council said the 7th Circuit "worked a revolutionary and mischievous change in disciplinary proceedings."

Rule 46 allows the appeals court to discipline attorneys for conduct unbecomming an attorney or for failure to comply with the appellate rules. Rule 46 also says the disciplinary actions may be taken "after reasonable notice and an opportunity to show cause to the contrary, and after a hearing, if requested."

The 7th Circuit said the "reasonable notice" requirement in Rule 46 was satisfied by the footnote in opposing counsel's brief requesting sanctions.

"In all circuits but the 7th, disciplinary proceedings against a lawyer by a court of appeals are set in motion by the court itself, through the issuance of a rule to show cause," the brief said. "But the 7th Circuit, through this opinion, has delegated that crucial power—the power to institute disciplinary proceedings—to litigants."

The Council also argued that the 7th Circuit inappropriately tied together Rule 11 of the Federal Rules of Civil Procedure and Rule 46 of the Federal Rules of Appellate Procedure.

Rule 11 permits district courts to sanction lawyers or parties for filing untrue or frivolous pleadings.

The 7th Circuit noted that, although Rule 11 is not incorporated into Rule 46, the rule helps define what is conduct unbecoming a member of the bar under Rule 46.

"Accordingly, Federal Rule of Appellate Procedure 46 authorizes this court to impose sanctions on an attorney whose conduct violates Rule 11," the 7th Circuit said.

In its brief, the Council contends that the 7th Circuit inappropriately applied Rule 11.

"First, it looks unfair to discipline lawyers for violation of a rule that on its face does not apply to the court in question," the brief said.

Second, the Council argued, Rule 11 is poorly tailored to the appellate disciplinary process, but in fact is a rule of civil procedure designed to compensate the opposing party.

"Rule 46 says nothing of Rule 11, and Rule 11 says that it applies to the district courts. Petitioner's fine, on the bases of an unwritten rule, therefore looks unfair, and in facts was unfair." *Platt v. U.S. Court of Appeals for the 7th Circuit*, No. 88-1756.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 86 C 4667 Date: JAN 4 1990
Name of Assigned Judge: PAUL E. PLUNKETT
Case Title: FOLSTAD V. HARMON

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is denied. Disputed questions of fact exist concerning whether Folstad was terminated on the basis of her sex and whether, while employed, she received lower pay because of her sex. Final pretrial order to be filed on March 6, 1990. Ruling date of January 24, 1990 is stricken.

* * * * *

(7) ☒ Status hearing ☒ reset for March 6, 1990 at 9:15 a.m.

* * * * *

☒ Docketing to mail notices

* * * * *

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. A-409

Nancy L. Folstad, et al.,

Petitioners

v.

Illinois State Board of Investment, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including January 25, 1990.

/s/ John Paul Stevens
Associate Justice of
the Supreme Court
of the United States

Dated this 27 day of November, 1989.